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No. 85-542

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

JOHN ROTH, ONA ROTH, SONOMA INVESTMENT CORPORATION, LEWIS BROWN, DOROTHY JEAN BROWN,
Petitioners,

VS.

CITY OF VALLEJO,
Respondent.

On Writ of Certiorari
To the Court of Appeal of The State of California

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

With respect to that part of the City of Vallejo, California, Zoning Ordinance which regulates the use of property within the City for adult bookstores and adult theaters,

(1) Do petitioners have standing to challenge the Ordinance;

(2) If petitioners have such standing, is the Ordinance impermissibly vague or overbroad; and

(3) Does the Zoning Ordinance unreasonably suppress or restrict access to sexually graphic materials?

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, City of Vallejo, California, respectfully requests that the petition for writ of certiorari filed herein be denied.

STATEMENT OF THE CASE

This is an action to enforce the provisions of the Zoning Ordinance of the City of Vallejo, California, with respect to petitioner's use of certain real property within the City as an adult bookstore and as an adult theater. The regulations of the City's Zoning Ordinance does not permit the use and operation of an adult bookstore/theater at the location in question. By its amended complaint in this action, City sought to enjoin the violation of the Zoning Ordinance, and further to enjoin the continued utilization of the property as an adult theater and adult bookstore on the basis that such use constituted a public nuisance. Clerk's Transcript, hereinafter CT, pp. 137-145.

Petitioners, operators of the adult theater and bookstore, answered the complaint denying the material allegations thereof, and setting up certain affirmative defenses, including a claim that the Zoning Ordinance provisions pertaining to adult theaters and adult bookstores were unconstitutional. CT, pp. 48-49.

Trial was had before the Superior Court of the County of Solano, California, sitting without a jury.[1] At the May 7, 1981 portion of the trial, petitioners admitted that they were operating an "adult bookstore" and "adult theater" within the definition of the City's ordinance. CT, pp. 85-86. RT (5-7-81) pp. 36-37. At the September 23, 1982 portion of the trial, all prior stipulations and admissions were agreed upon. RT, p. 4.

The Superior Court of Solano County upheld the constitutionality of the ordinance and entered a judgment directing the issuance of a permanent injunction commanding petitioners to cease and desist from the use, operation and maintenance of the realty as an adult bookstore/theater in violation of the applicable provisions of the Zoning Ordinance of the City.

The Court of Appeal of California, First Appellate District, in an opinion filed April 25, 1985, affirmed the judgment. On May 22, 1985, the Court of Appeal issued an Order Modifying the Opinion and Denying a Rehearing. Petitioners petitioned for review by the California Supreme Court, which petition was denied on July 17, 1985.

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[1] The matter was heard in part on May 7, 1981 at which time certain admissions, discussed *infra*., were made and stipulated between the parties. Subsequent to May 7, 1981, Richard Chesney, the attorney then representing the petitioners herein, died. Thereafter, petitioners' attorney, Arthur Wells, Jr., took over the case. The remainder of the case was tried on September 23, 1982. See Reporter's Transcript, pp. 3-4. (Hereafter, the September 23, 1982 Reporter's Transcript will be referred to as RT. The Reporter's Transcript for May 7, 1981 will be referred to as RT (5-7-81).

SUMMARY OF FACTS

Since at least July 1, 1976, petitioners have occupied and utilized the property at 540 Georgia Street in the City of Vallejo as an adult bookstore and adult theater. Such use continues to this date. CT, p. 269; CT, p. 96.

In February 1978, the City Council amended the City's Zoning Ordinance by adopting an ordinance which defined "adult bookstore" and "adult theater" and provided for the location of these uses within certain zoning districts upon meeting certain specified criteria. This ordinance also established a time period within which existing adult bookstores and adult theaters had to comply with the provisions of the ordinance. CT, pp. 167-169.

Under the provisions of the Zoning Ordinace, the term "adult bookstore" is defined as follows:

> " 'Adult bookstore' means any commercial establishment that has twenty-five percent (25%) or more of its stock in books, magazines, photographs, drawings, motion pictures, films or other representations which describe or depict sexual intercourse, homosexual acts, masturbation, fellatio, cunnilingus, beastiality, sodomy, sadomasochistic abuse or other sexual excitement or sexual conduct." CT, p. 149.

Further, under the provisions of the Zoning Ordinance, the term "adult theater" is defined as follows:

> " 'Adult theater' means any establishment which shows or provides for a fee films, twenty-five percent (25%) or more of the number of which depict or show any of the acts described in Section 16.04.011. This includes any video tape system or film cartridge system which displays on a viewer, screen, or television set. This section includes any motel which provides any such films, video tape, cartridges, or other viewing system for the use of guests or customers in individual rooms, or otherwise." CT, p. 149.

Under the present provisions of the Zoning Ordinance, adult uses: (1) are to be located only within certain zoning districts, i.e., a Linear Commercial District, a Pedestrian Shopping and Service District or an Intensive Use District; (2) cannot be located within

500 feet of a residential zoning district, or within 500 feet from the property line of any park, playground, library, public or private school; (3) cannot be located within 1,000 feet of another adult use. RT, pp. 14-16; CT, pp. 150-154, 156-159.

In adopting the ordinance in 1978, the Vallejo City Council made certain finding s (which findings are now codified in § 16.57.020 Q of the Vallejo Municipal Code):

> "'. . . adult bookstores and adult theaters (as defined in Sections 16.04.011 and 16.04.012) have an adverse impact on the tone of commerce in the city generally. They cause mental distress and anguish to nearby residents; they attract undesirable persons who pose dangers to school children and who interfere with adjoining businesses; adult bookstores, when placed on major thoroughfares, tend to downgrade the image of the city and to make it a less desirable place to work and live. The regulations contained in (this subsection) have been enacted to alleviate these impacts. . . ." CT, pp. 167-168; Ordinance No. 693 N.C.(2d), augmented to the Appellate Court record.

Pursuant to the Zoning Ordinace, adult bookstores and theaters which were in existence in the City of Vallejo on March 1, 1978, were not required to comform to the provisions of the ordinance immediately, but were allowed to amortize their use over a period of one year, after which time they would be required to comply with the provisions of the ordinance. The ordinance further provided that upon a showing of extreme hardship, the Planning Commission at a public hearing on the subject, could grant a one-year extension of the time before compliance would be required. CT, p. 167, Ordinance No. 693, N.C.(2d), augmented to the Appellate Court record.

At trial, the evidence established that the adult use of petitioners was within 500 feet of a residential zoning district and (at the time of trial) was also within 1000 feet of another adult use. RT, pp. 16-17) CT, p. 269.

Also at trial the City introduced certain maps (City Exhibits 10, 11 and 12) which maps showed the areas of the city which were not only zoned for adult uses, but also showed the areas of

the City which then met the 500 feet/1000 feet spacing requirements of the Ordinance.

Those exhibits also showed the existence of either vacant buildings or vacancies in buildings on the day when the City conducted a visual survey of the areas. The areas include a three block area in downtown Vallejo (CX #10), a portion of South Vallejo along heavily traveled Sonoma Boulevard (CX #12), and a large area in Nothwest Vallejo along major thoroughfares such as Sonoma Boulevard and State Route 37 (CX #11). Included in this Northwest area are two large shopping centers and other developed property which even petitioners' witness, Jack Flanders, admitted had sites which, if available, would in his opinion be suitable for adult uses. RT. pp. 109-110, 116-117. Flanders also acknowledged that there were buldings in the downtown area which, if available, were suitable for adult uses. RT, pp. 115-116.

Petitioners' witness, Flanders, also testified that he made a survey of the areas on or about September 7, 1982 and *on that day* there were no buildings for sale or lease which in his opinion were suitable for adult uses. RT, pp. 89, 116, 85-86.

The City conducted its own survey of the areas shown on City Exhibits 10, 11, and 12, apparently a few days after the survey undertaken by Mr. Flanders. RT. pp. 89, 100-102. In addition to the sites found by Flanders, several of which the City maintains are in fact suitable, two other sites which appear to meet even petitioners' stringent suitability requirements were found. RT, pp. 100-103, 107-109. Furthermore, Mr. Flanders acknowledged that in the past two or three years there were numerous buildings in downtown Vallejo as well as in the two large shopping areas that were for sale or lease which would have been suitable for adult uses. RT, pp. 105, 109-110, 115-119. Fred Sessler, another witness called by petitioners, also recalled numerous buildings for sale or lease in these areas in the past two or three years. RT, pp. 54-55, 57-62. The City's witness, Assistant Planning Director Christine Huddle, also testified that in the South Vallejo Industrial Park (on CX #12), there are sites available for retail use which are consistent with adult uses. RT, pp. 121-122.

From the above, the trial court found substantial evidence that the City had provided through its zoning regulations ample areas in the City in which adult uses may locate and that the areas have numerous buildings and sites which if available would be suitable for adult uses. CT, p. 169. The Appellate Court concurred in that finding. (Appellate Court Decision, pp. 10-11.) [*City of Vallejo* v. *Adult Books* (1985) 167 CA3d 1169, 1180-1181; ____ Cal.Rptr. ____.]

ARGUMENT

Introduction

The Court of Appeal of the State of California correctly and authoritatively decided the issues which the petitioners have raised in this case. That decision is in keeping with the decisions of this Court and not in conflict with federal appellate court cases concerning a city's reasonable regulation of adult uses. That being the case, the petition before this Court ought to be denied.

I

The Court Should Deny the Writ Because There Is No Conflict Between the California Appellate Court Decisions and the Federal Courts of Appeal

Petitioners claim that there is a conflict between the California appellate courts and federal appellate courts, including this Court, concerning the interpretation and application of this Court's decisions in *Young v. American Mini Theatres, Inc.* (1976) 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310. and in *Schad v. Borough of Mt. Ephriam* (1981) 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671. That claim, however, does not withstand analysis.

In *Young v. American Mini Theatres, supra,* this Court upheld zoning restrictions on the location of adult entertainment businesses essentially akin to those in the Vallejo Zoning Ordinance at issue here. The "majority opinion" is composed of a plurality opinion by Justice Stevens speaking for four members of the court and a concurring opinion by Justice Powell.

The opinions of both Justice Stevens and Justice Powell concluded that the City of Detroit ordinance at issue in that case did not unconstitutionally restrict First Amendment rights. Jus-

tice Stevens reasoned that just as a City may and usually does impose licensing and locational restrictions in general without running afoul of the prior restraint doctrine, so may a City impose *special* licensing and locational restrictions on adult theaters. The court further reasoned that no prior restraint resulted from such locational and licensing restrictions so long as they did not have the effect of denying distributors of adult films access to their market. *Young v. American Mini Theatres, supra*, 427 U.S. at pp. 62-63; 40 L.Ed.2d at pp. 321-322.

Justice Powell concurred with the plurality opinion that the ordinance did not violate the First Amendment. He concluded that the ordinance imposes typical time, place and manner restrictions common to zoning ordinances. However, he believed the ordinance did not regulate "adult businesses" because of the *content* of the materials they disseminate, but rather because of the deleterious effect these businesses have on their surroundings, an effect which is markedly different from other types of businesses. *Young v. American Mini Theatres, supra*, footnote #6, 427 U.S, at p. 83; 49 L.Ed.2d at p. 333. In other words, the municipality's treatment of these type uses was justified by the interest of the municipality in preserving the character of its neighborhoods.

Furthermore, in the *Young* case, this court found that there was a factual basis for the conclusion that a dispersal type ordinance, like the one at issue here, would have the effect of preserving the municipality's neighborhoods. *Young v. American Mini Theatres, Inc., supra*, 427 U.S. at 71. This Court also validated the Detroit zoning regulations because the regulations did not prohibit or significantly restrict the adult entertainment uses, thereby burdening First Amendment interests only incidentally.

Schad, on the other hand, prohibited all live entertainment within the town, including nude dancing. This court found that unlike the situation in *Young*, the Mt. Emphriam ordinance severely restricted free expression and that the local government had made no factual finding to warrant such an onerous burden on First Amendment interests.

As set forth in Respondent's *Summary of Facts,* the Vallejo ordinance was adopted because the City Council found that "adult bookstores and adult theaters . . . have an adverse impact on the tone of commerce in the city generally. They cause mental distress and anguish to nearby residents; they attract undesirable persons who pose dangers to school children and who interfere with adjoining businesses; adult bookstores, when placed on major thoroughfares, tend to downgrade the image of the city and to make it a less desirable place to work and live." Section 16.57.020Q, Vallejo Municipal Code.

Citing other California appellate court decisions, the Appellate court in the decision below held that the City was not required to establish independently a factual basis to support the Ordinance as applied to local conditions. (Appellate Court Decision, p. 8). [*City of Vallejo v. Adult Books, etc. supra,* at 1178].

Petitioners cite a number of federal court cases for the proposition that an independent factual basis is required before a city may regulate adult uses. That proposition, however, is in error. The cases cited by petitioners involve ordinances which either banned adult uses entirely, significantly reduced the number of such uses in the community, or relegated the uses to areas of the city in which access was severely limited.[2]

For example, in *Avalon Cinema Corp. v. Thompson* (1981) 667 F2d 659 (8th Cir.), *Playtime Theatres, Inc. v. City of Renton* (1984) 748 F2d 527 (9th Cir.) (*prob. juris. noted.* _____ U.S. _____ 105 S.Ct. 2015, 85 L.Ed.2d 297 (1985) and *Keego Harbor Co. v. City of Keego Harbor* (1981) 657 F2d 94 (6th Cir.), all relied upon by petitioners, the effect of the ordinances in question showed that the zoning regulations would

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[2] Certain cases cited by petitioners are completely inapposite to the case at bench. In *Kuzinich v. County of Santa Clara* (1982) 689 F2d 1345 (9th Cir.), the ordinance was not directed to the deconcentration of uses, but was directed to traffic and littering, In *Fantasy Bookshop, Inc. v. City of Boston* (1981) 652 F2d 1115 (1st Cir.), the ordinance *concentrated* the uses, not dispersed them; moreover, the case was a licensing case in which the Court said no more than some evidence was required in order to deny the license.

result in a total ban on the establishment of adult bookstores/theatres in the community.

In another case relied upon by petitioners, *Basiardanes v. City of Galveston* (1982) 682 F2d 1203 (5th Cir.), the ordinance in question did not totally ban adult uses. However, the ordinance would have permitted operation of adult uses only in industrial areas and at great distance from other consumer oriented establishments; these same areas in Galveston had few access roads and were poorly lit—the ordinance rendered it practically impossible to open an adult theater.

Where this Court (as in *Schad*) and the federal appellate courts have found that there is a significant burden placed on these type uses, it is not surprising to understand the requirement that there be an independent factual basis for the imposition of this burden. But where the federal appellate courts have found that the burden on First Amendment interests to be slight and incidental, i.e., when the facts demonstrate that the sites within the city at which these uses can locate are not prohibited nor significantly restricted, then consistent with this Court's decision in *Young*, there is no constitutional requirement of an independent factual basis for the adoption of the regulations. *See CLR Corp. v. Henline* (1983) 702 F.2d 639 (6th Cir.) [Ordinance invalidated in part because city made *no* factual findings that the spacing requirements would prevent urban blight, but city "*need not have conducted its own research in this area*". (Emphasis added)]; *Lydo Enterprises, Inc. v. City of Las Vegas* (1984) 745 F.2d 1211 (9th Cir.) [No empirical findings needed to justify ordinance regulating placement of adult uses].

Consequently, the cases relied upon by petitioners have no application to the California Appellate Court decision below which correctly distinguished the facts of those cases from the facts existing in Vallejo. (Appellate Court Decision, pp. 9-11) [*City of Vallejo v. Adult Books, supra*, at 1179-1181]. The Appellate Court found that not only does the Vallejo ordinance provide space for more than the existing number of adult uses, but also that the locations include downtown Vallejo, include commercial areas along heavily traveled major thoroughfares throughout the City, and include two major shopping centers. Without

question an adult use could locate in downtown Vallejo; at least two (and possibly more) could locate in South Vallejo and still not be within 1,000 feet of each other. With respect to North Vallejo, because of the size of the area, it is obvious that numerous adult uses could locate in that area and not run afoul of the 1,000 foot dispersal requirement.

In summary, the Vallejo ordinance leaves ample room for those persons who wish to engage in this activity to ply their trade within the City limits of the City of Vallejo. Pursuant to the broad authority granted to cities to preserve the quality of urban life, which authority allows cities a reasonable opportunity to experiment with solutions to serious problems, and where the ordinance is not calculated to choke free expression protected by the First Amendment, then the legislative body is entitled to rely on the findings of other jurisdictions as a basis for action. This Court requires no more. *Young v. American Theatres, Inc., supra,* 427 U.S. at 71, n.34, 74-75, 80-81 n. 4; *accord: Genusa v. City of Peoria* (1980) 619 F2d 1203 (7th Cir.).

That being the law of the land and the California Court of Appeal decision consistent therewith, there is no reason to grant the petition for a writ of certiorari in this case.

II

The Court Should Deny the Writ because Petitioners Lack Standing to Challenge the Ordinance on Grounds of Vagueness

Petitioners' second argument is that this Court should grant the writ because a portion of the Vallejo ordinance is impermissibly vague under federal constitutional standards. However, because petitioners lack standing to challenge the ordinance for vagueness, the petition for a writ of certiorari should be denied.

Petitioners admitted at trial that they are within the city's definition of adult bookstore and adult theater and that the ordinance clearly applied to them. RT (5-7-81) pp. 36-37; CT, pp. 96-97.

In *Young v. American Mini Theatres, supra*, a majority of the Supreme Court held that because the ordinance clearly applied to them, the operators of the adult theaters did not have standing to challenge the ordinance either for vagueness or overbreadth. See *Young v. American Mini Theatres, supra*, 427 U.S. at 59-61 and n.17, 49 L.Ed.2d at 319-321.

The Appellate Court concluded that petitioners lacked standing to challenge the ordinance on vagueness grounds. (Appellate Court Decision, p. 8) [*City of Vallejo v. Adult Books, supra* at 1176]. This conclusion followed the Court's agreement with Respondent's contention that petitioners have no standing to challenge the ordinance because (1) petitioners had admitted that their business was within the ambit of the ordinance and (2) the ordinance's deterrent effect on expression was not real and substantial and the ordinance was readily subject to a narrowing construction by state courts. *Young v. American Mini Theatres, supra*, 427 U.S. 50, 60.

As recognized by the Appellate Court, federal and California law is in accord that where an adult use ordinance clearly applies to them, operators of such businesses do not have standing to challenge the ordinance either for vagueness or overbreadth. *Young v. American Mini Theatres, supra, Basiardanes v. City of Galveston, supra; Castner v. City of Oakland* (1982) 129 CA3d 94, 180 Cal.Rptr. 682.

Consequently, petitioners have no standing to challenge the constitutionality of the ordinance on the grounds of vagueness. That being the case, the petition for the writ should be denied.

CONCLUSION

For the above stated reasons, it is respectfully requested that the petition for writ of certiorari be denied.

December 5, 1986

Respectfully submitted,

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City of Vallejo